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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1946

No. 583

PHILIP B. FLEMING, Temporary Controls
Administrator, *Petitioner*

v.

MOHAWK WRECKING and LUMBER COMPANY,
a Partnership, and Harry Smith, *Respondent*.

On Writ of Certiorari to the United States Circuit
Court of Appeals for the Sixth District

**RESPONDENT'S REPLY BRIEF IN SUPPORT OF
MOTION TO VACATE ORDER OF DECEMBER
16, 1946, ALLOWING SUBSTITUTION OF
PHILIP B. FLEMING, ADMINISTRATOR,
OFFICE TEMPORARY CONTROLS
FOR PAUL A. PORTER, AD-
MINISTRATOR, OFFICE OF
PRICE ADMINISTRATION**

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Believing that the brief of appellant filed in opposi-
tion to Respondent's Motion to Vacate Order of De-
cember 16, 1946, allowing the substitution of Philip
B. Fleming, Administrator, Office of Temporary Con-
trols for Paul A. Porter, Administrator, Office of Price

Administration presents arguments properly the subject of refutation, respondent respectfully submits this reply brief to the end that the court be fully advised of the erroneous conclusions sought to be drawn by appellant.

Summarized, the action taken by the President in transferring the functions of the Price Administrator to the Temporary Controls Administrator is sought to be justified under authority of (a) First War Powers Act, (b) Section 201(b) of the Emergency Price Control Act. Consideration is given to the position so taken as presented to the court.

I. The First War Powers Act Authorized the Creation of an Agency Such as the Office of Temporary Controls to Receive Transferred Powers.

Though conceding that the language of the First War Powers Act does not specifically state that the President may create a new agency which will consolidate the functions and powers previously exercised by other agencies, the Temporary Controls Administrator argues that the statute has always been construed by the Executive Department to confer such authority. The interpretation of the Executive Department of the Government has been recognized by the court as meriting consideration *where ambiguous statutes are involved*, but this rule has no application where to attempt to follow the construction sought would simply mean overriding the plain language of the law. (*Koshland v. Helvering*, 298 U.S. 441; *Sanford v. Commissioner of Internal Revenue*, 308 U.S. 39, 42 Am.

Jur., page 405, Section 82, and cases there cited.) The argument of "executive construction" cannot be urged upon this court now that such construction is challenged, notwithstanding general acceptance and acquiescence in the past occasioned by reason of a period of national emergency. To give full weight to this contention of the Temporary Controls Administrator—that the President has the power to act as he has acted because the President has concluded that he has the power—places the entire argument within the meaning of the phrase "*l'etat, s'est moi*." (I am the state).

Furthermore, in presenting the action taken by the Executive Department in reliance upon the First War Powers Act it seems significant that the Temporary Controls Administrator fails to cite a single agency, particularly of Congressional creation, *abolished* by the President and which had its functions transferred to a *new* agency created by the President.

In this connection the language of the court in the case of *Bowles v. Johnson*, January 30, 1947, C.C.H. Price Control Service, paragraph 52,622 is apropos.

"Counsel for plaintiff calls attention in his brief to the fact that Congress has time and time again appropriated funds for various agencies that have been consolidated by executive order, or directive. By so doing Congress has acquiesced in the executive construction of the First War Powers Act which gave the President sweeping powers and authority to consolidate, modify, and streamline the various war agencies. Attention is called further to the fact that money was appropriated for the Offices of Defense Transportation, Economic Stabilization, Scientific Research and De-

velopment, War Information, War Mobilization, Reconversion, War Relocation, and others. The appropriation of such funds for these offices by the Congress might be considered as an acquiescence and approval of such continuing legislation and activities. However, the court discovers upon scrutinizing these appropriations for the various agencies mentioned, that the agencies are all auxiliaries or arms of some offshoot of the executive branch of government. They are agencies of or within, the executive framework, or department of government, which brings them well within the meaning of the War Powers Act. Those agencies which are creatures of Congress are not mentioned.

"Executive Order No. 9809 of December 12, 1946, is the first example of the President usurping authority to legislate in a field which had been solely occupied by Congress over a sector of war time control which had not been subjected to executive responsibility of authority. Since the President relies upon empowering acts which do not give him the authority granted, the act of creating the Office of Temporary Controls as a liquidating agency for the gradual diminution of the price control restrictions was invalid and without authority." California Municipal Court, City of Long Beach, County of Los Angeles, No. 52643 (Emphasis added).

In our main brief we demonstrated that the First War Powers Act constitutes no authority for the President to abolish an agency created by Congress in its entirety and to seek to transfer the duties and functions to a new agency created by the President, particularly where the Administrator of the Congressional agency can only be appointed to the office with the advice and consent of the Senate. Little is said in reply to the contention, yet, it would appear to be

sufficient in support of this position to point to the clear language of Section 604 of the First War Powers Act (50 U.S.C.A., App. Sec. 604) limiting the power of the President to a report to Congress where the President concludes "that any bureau should be abolished and it or their duties and functions conferred upon some other department or bureau or eliminated entirely." In addition, however, we respectfully call the attention of the court to the statement made by Representative Gwynne of Iowa, a member of the Judiciary Committee of the House who served on the subcommittee in charge of the First War Powers Act, of the express limitation upon executive action to abolish departments or bureaus and transfer their functions elsewhere. In explaining the bill on the floor of the House, Representative Gwynne said:

"There is no use of denying the fact that this / Title I / gives the President tremendous powers to reshuffle bureaus and commissions, and to take the duties and powers from one Government commission or corporation and put them somewhere else. There are, however, certain limitations. For instance, there is no authority granted to consolidate executive departments, and no authority is given to abolish a bureau or an agency. The President's authority there is limited to making a report to the Congress before taking further action" / Emphasis added /. Congressional Record, Vol. 87, Part 9, 77th Cong., 1st Sess., p. 9862.

By settled rules of statutory interpretation the explanation of a bill by a member of the committee in charge of the bill is entitled to great weight. See *Wright v. Vinton Branch*, 300 U.S. 440, 459, 463 (1937); 2 *Sutherland on Statutory Construction* (3rd Ed.),

§ 5012. It is thus clear, both from the text of § 604 of the statute and from the clear exposition by Representative Gwynne of the limitations therein placed on executive action, that the action taken by the President in Executive Order 9809, abolishing the Office of Price Administration, was clearly beyond the authority granted to the Chief Executive by the Congress.

But, it is argued that current Congressional proceedings show Congress' acceptance of the action taken in Executive Order 9809 in the appropriation of funds by the Congress to the Office of Temporary Controls, and it is argued that under the cases of *Isbrandtsen-Moller Co. v. United States*, 300 U.S. 139 and *Brooks v. Dewar*, 313 U.S. 354, Congress has ratified the President's action in Executive Order 9809.

It is submitted that a careful reading of the cases cited do not support the position taken. In the former case, the point was put at rest by affirmative action of the Congress by passage of the Merchant Marine Act of 1936, Sec. 204(a), the functions of the former Shipping Board are referred to as "now vested in the Department of Commerce pursuant to Sec. 12 of the President's Executive Order No. 6166" (300 U.S. 139, 147-148).

In the latter case, the action taken by an agent of Congress, the Secretary of the Interior, under a statute of the Congress was the subject of consideration. The court, in arriving at its conclusion, appears to have placed great reliance upon the form of the Appropriations Act which was cited in a footnote, and by specific enumeration of the uses to which such money was to be expended effected "a ratification of

the action of the Secretary as the agent of Congress in the administration of the act" (313 U.S. 354, 361). Here, the power of the President to transfer duties and functions from a Congressional agency requiring the confirmation of the Administrator chosen by the Chief Executive by the Senate, to an Executive agency created by President requiring only Presidential designation of the Administrator is in issue. It is submitted the *Brooks* case cannot be relied upon by the Temporary Controls Administrator.

Moreover, consider the form of the Appropriation Act passed. The sum of \$7,051,752 is "to be available for the payment of terminal leave only", and the proviso omitted by appellant in quoting the Section declares: "That it is the intent of the Congress that the funds heretofore and herein appropriated shall include all expenses incident to the closing and liquidation of the Office of Price Administration and the Office of Temporary Controls by June 30, 1947."¹

¹ The complete applicable text of H.R. 1968 is as follows: H.R. 1968, Title I—General Appropriations * * * Executive Office of the President, Office for Emergency Management * * * Office of Temporary Controls. Salaries and Expenses: For an additional amount, fiscal year 1947, for the Office of Price Administration transferred by Executive Order 9809 of December 12, 1946, to the Office of Temporary Controls, \$7,051,752, to be available for the payment of terminal leave only; provided, that it is the intent of the Congress that the funds heretofore and herein appropriated shall include all expenses incident to the closing and liquidation of the Office of Price Administration and the Office of Temporary Controls by June 30, 1947.

Title II—Reductions in appropriations and Authorizations. Amounts available to the departments and agencies from appropriations and other funds are hereby reduced in the sums hereinafter set forth; such sums to be carried to the surplus fund and covered into the Treasury immediately upon the approval of this Act:

Executive Office of the President, Office for Emergency Management * * * Salaries and Expenses, Office of Price Administration functions, Office of Temporary Controls, 1947, \$2,000,000: provided that the Office of Price Administration shall be discontinued and its affairs shall be entirely liquidated not later than June 30, 1947.

Rather than constituting approval and ratification of the President's action, it is submitted that the action of Congress simply amounts to a recognition on the part of Congress that a claim for terminal leave on the part of Government employees should be paid.

Nor does the case of *California Lima Bean Growers Association v. Bowles*, 150 Fed. (2d) 964 referred to by the Temporary Controls Administrator as having exhaustively treated the whole subject of the First War Powers Act have any application here since it dealt only with the transfer of certain limited functions of an agency under Section 601 of the First War Powers Act and was in no way concerned with the transfer of all functions and the abolition of an agency under Section 604.

II. Even If the Transfer is Invalid Under the Provisions of the First War Powers Act Alone, It Can Be Sustained Under Section 201(b) of the Emergency Price Control Act.

By the same token, no reliance can be placed in any way upon the language of Section 201(b) of the Emergency Price Control Act, 1942, to justify the attempted transfer in toto of the duties and functions of the Administrator, Office of Price Administration, to the Administrator, Office of Temporary Controls. That section simply authorizes the President "to transfer any of the powers and functions conferred by this Act upon the Office of Price Administration with respect to a particular commodity or commodities to any other department or agency of the Government

having other functions relating to such commodity or commodities" * * *. Language of such express, limited application cannot be misconstrued to encompass a transfer of all duties and functions of the Price Administrator to a new office and new officer.

As far as respondent has been able to ascertain through diligent search of the authorities as to the date of the filing of this reply brief there have been but five (5) cases passing on the merits of the point under consideration and such cases have only been reported unofficially. They are as follows:

Porter v. Wilson, U.S. District Court, Oregon, Civil No. 3393, January 25, 1947 (C.C.H. Price Control Service, Par. 52,622);

Porter v. Ryan, U.S. District Court, Oregon, January 8, 1947, 15 Law Week, Page 2390;

Bowles v. Johnson, California Municipal Court, City of Long Beach, County of Los Angeles, No. 52643, January 30, 1947 (C.C.H. Price Control Service, Sec. 52,625);

Porter v. Hirdhara, U.S. District Court, Territory of Hawaii, Civil No. 760 and 761, January 29, 1947 (C.C.H. Price Control Service Par. 52,628);

Porter v. Goodwin, U.S. District Court for Western Missouri, November 1, 1946, 15 Law Week, Page 2278.

In each and all of the foregoing cases the court has either denied motions to substitute Philip B. Fleming, Temporary Controls Administrator for the plaintiff,

Administrator of the Office of Price Administration or refused to enforce the Emergency Price Control Act, 1942, as amended, on one ground or the other set forth in respondent's main brief.

The argument advanced by appellant thus finds no support either by examination of the clear language of the First War Powers Act itself or by judicial construction of that Act and analysis of the entire problem by the lower courts who have had occasion to go into the merits of the argument.

CONCLUSION

We feel compelled to point out that the appellant's brief serves only to emphasize that except where the order relates to functions in reality those of the President administered by the Office of Price Administration, the action taken by the President under Executive Order 9809 was beyond his authority and cannot be legally justified. It is reiterated that the duties of an office created by Act of Congress which specifically requires confirmation by the Senate of an Administrator of such office cannot by Executive fiat be transferred to an office and officer not so confirmed. Acquiescence during a period of emergency cannot be made the basis for assumption of power not granted when such assumption of power is challenged through the judicial process.

Respectfully submitted,

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Dated: March, 1947.